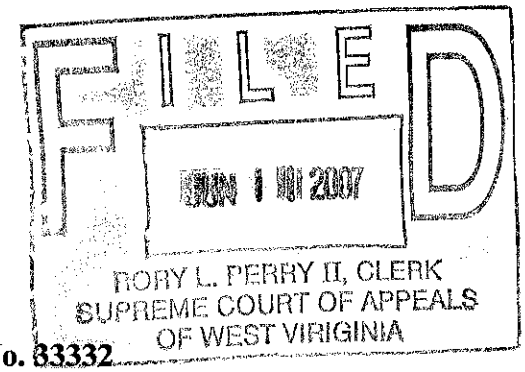
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



Angela L. Varney,

Appellant

Vs. **No. 33332**

Mingo County Case No. 89C-7566

Cecil C. Varney,

Appellee

BRIEF OF APPELLANT

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NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTION

ANGELA L. VARNEY,

Plaintiff/Petitioner,

VS. MINGO COUNTY CASE NO.: 89C-7566

CECIL C. VARNEY,

Defendant.

- -

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF APPEALS:

STATEMENT OF FACTS OF THE CASE AND MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR APPEAL

Comes now Angela L. Varney, petitioner, *pro se*, and submits this Statement of Facts of the Case and Memorandum of Law in Support for the Petition for Appeal of an Order by the Circuit Court of Mingo County, West Virginia, made and entered into on the 8th day of September, 2005, in Civil Action No. 89C-7566.

Petitioner seeks to appeal the Final Order Denying Appeal and Affirming Final Order of the Family Court, entered by Honorable Michael Thornsbury, Chief Judge of the 30th Judicial Circuit Court. The Final Order of the Family Court was entered on December 21, 2004.

> Since the time a temporary hearing was held in this matter by the former Special Family Law Master, the Defendant has failed to comply with his agreement made. Whether, due to the delay of the entry of the Order, the matter can be said not to constitute a decretal judgment, it nevertheless constituted a contractual commitment of the Defendant to make such payments. Accordingly, the Plaintiff shall be granted a judgment against the Defendant for all arrearages of alimony totaling Eleven Thousand Dollars ($11,000.00) plus interest calculated at ten percent (10%) from the month of October, 1991, per annum, and Five Thousand Two Hundred Dollars ($5,200.00) for payments made by Plaintiffs on the debts, plus interest, from the month of October, 1991, at a rate of 10% per annum.

On June 23, 1992, Cecil C. Varney filed a petition for appeal to the West Virginia Supreme Court of Appeals, praying for an appeal from the judgment rendered against him. By an Order entered on December 9, 1992, the Supreme Court refused his petition for appeal.

Additionally, on or about January 29, 1992, Cecil C. Varney filed a Chapter 7 Bankruptcy Petition in the United States Bankruptcy Court for the Southern District of West Virginia. With the filing of the bankruptcy action, all enforcement actions against Cecil C. Varney were automatically stayed by operation of law until the Discharge Order was entered on May 15, 1992. Angela L. Varney filed a proof of claim in the bankruptcy case, seeking payment of the judgment entered in the divorce case. She also filed an adversary proceeding to determine the dischargeability of her claim in the bankruptcy case.

On June 11, 1993, the Bankruptcy Court entered on Order granting Angela L. Varney default judgment. In its Order, the Bankruptcy Court stated that "if the Plaintiff's Motion for Default Judgment was set aside and this case went to trial, there would be no evidence the Defendant could present which could justify denial of the relief sought by the Plaintiff . . ." Furthermore, the Bankruptcy Court, when referring to relief sought by Angela L. Varney in her

Amended Complaint, found that '[the] Defendant's indebtedness described therein were payments ordered by the Family Law Master, in the nature of support and alimony. These findings are supported by the findings and the Orders of the Family Law Master in State Court in the extensive litigation conducted there to identify the nature of these payments." The Bankruptcy Court, in awarding Angela L. Varney judgment against Cecil L. Varney, ordered as follows: "ORDERED that the damages shall be measured by Paragraphs 3 and 5 of Plaintiff's amended complaint, being $11,000 for temporary alimony and $5,200 for support payments, with interest in accordance with the divorce decree of the Circuit Court of Mingo County."

The following day, Cecil C. Varney filed a motion in opposition to the default judgment and a motion for relief from the judgment. By Order entered June 23, 1993, the Bankruptcy Court denied Cecil C. Varney's motion for stay of that judgment pending appeal. In its June 23, 1993 Order, the Bankruptcy Court stated: ". . . the Court is of the opinion that the debt is in the nature of support for the Plaintiff." The United States District Court affirmed the action of the Bankruptcy Court and denied Cecil C. Varney's request for a jury trial by Order entered February 17, 1994.

Cecil C. Varney then appealed the matter to the United States Court of Appeals for the Fourth Circuit. By Order entered on March 28, 1996, the Fourth Circuit affirmed the District Court's Order affirming the Bankruptcy Court's Order which granted partial default judgment to Angela L. Varney. In its decision, the Fourth Circuit stated:

> The debt at issue arose from Cecil's agreement to pay Angela $1000 per month as alimony and $400 per month for credit card debts. This agreement was incorporated into an order labeling the payments as alimony and support. The final divorce decree noted Cecil's failure to comply with his contractual agreement to pay Angela $1000 per

> month for temporary alimony and $400 per month for credit card debt. The temporary nature of the payments and the reference in the divorce decree to a contractual agreement do not negate the parties' intent that the payments be alimony and support payments. Further, we find no clear error in the district court's affirmance of the bankruptcy court's findings that the debt was for alimony and support.
>
> *In Re Cecil Carl Varney, Debtor v. Angela Lea Varney*, No. 94-2045, slip op. at 6 (4th Cir. March 28, 1996)

On or about September 5, 1996, pursuant to an Affidavit of Accrued Support filed by the BCSE and Angela L. Varney, a Writ of Execution and Suggestion were issued by the Circuit Clerk of Mingo County to the Bank of Mingo to execute on the March 23, 1992 judgments. The Bank of Mingo answered that it had funds on deposit in the names of Mary Lou Varney, Cecil Varney's mother, and Cecil Varney. As the Defendant's response raised issues concerning the service and notice of this Writ and Suggestion on the account holders, the BCSE caused a new Writ and Suggestion to be issued by the Circuit Clerk on or about April 17, 1997, and properly served and noticed on the account holders. A hearing regarding the execution and the release of funds held by the Bank of Mingo was held before the Mingo County Circuit Court on September 30, 1997. The Court found that proper notice of the original suggestion was not given to Mary Lou Varney or Cecil C. Varney and that the funds in question were solely the property of Mary Lou Varney. By Order entered November 3, 1997, the Court quashed the Suggestion and lifted the stay on the bank account.

On or about September 22, 1997 the BCSE filed a Petition for Contempt and a Rule to Show Cause was issued that same date against Cecil C. Varney. A hearing was held on September 30, 1997, at which time the Court instructed the parties to file briefs on the issue of whether the debt was properly considered alimony, and thus subject to a contempt proceeding. A

status conference was held on January 26, 1998, at which time the problem of obtaining a transcript of the January 27, 1992 hearing was discussed. For various reasons the matter languished until August 19, 2002, when the Circuit Court of Mingo County held a hearing on the case. At that time counsel for the BCSE tendered to the Court a transcript of the January 27, 1992 hearing which Angela L. Varney had obtained. The Court read the brief transcript into the record, and found that at the former hearing, while valid judgment was granted against Cecil C. Varney in the amounts of $11,000 and $5,200, the Court in 1992 did not hold Cecil C. Varney in contempt. [*See* Transcript of August 19, 2002 Mingo County Circuit Court hearing.] By Order entered August 26, 2002, the Court ordered that the Rule previously issued be dissolved, and the Defendant not held in contempt.

As the Abstracts of Judgment which had been filed in 1996 and 1997 referenced March 19, 1992, the date the judge signed the Order granting the judgments totalling $16, 200, and not March 23, 1992, the date the Order was entered by the Circuit Clerk, an Amended Abstract of the March 23, 1992 judgment for $16,200 was issued by the Circuit Clerk of Mingo County on March 20, 2002. On that same date, the Circuit Clerk of Mingo County also issued a Writ of Execution and several Suggestions of Personal Property based upon the March 23, 1992 judgment. This execution of judgment is recorded in the Office of the Clerk of the Mingo County Commission in Execution Docket Book 2 at Page 132. [*See* the Affidavit of Margaret Kohari, Deputy Clerk, which was filed herein by Cecil C. Varney.]

On February 17, 2004 the Clerk of the United States District Court for the Southern District of West Virginia issued a Writ of Execution on the Judgment Order granted Angela L. Varney by the Bankruptcy Court on February 17, 1994. Said Writ of Execution was recorded in

the Office of the Clerk of the County Commission of Mingo County, West Virginia in Execution Book 2 at Page 157 on February 23, 2004.

On May 19, 2003, the BCSE and Angela L. Varney filed a Motion for Determination of Judgment in the Family Court of Mingo County. A hearing on said Motion was held before the Family Court Judge on November 12, 2003.

By Order entered on December 21, 2004, the Family Court of Mingo County made the following finding of fact: "That during the ten-year period from January 27, 1992, through and including January 27, 2002, no actions were taken by the plaintiff to preserve the decretal judgment other than administrative actions which do not satisfy the requirements set forth in Shaffer v. Stanley." The Family Court also ruled that the date of the original decretal judgment granted herein is January 27, 1992. [Note: January 27, 1992 is the date the Order in question was signed by the Judge. It was entered by the Circuit Clerk of Mingo County on January 28, 1992.]

Paragraph 2 of said Order states as follows: "That unless the judgment has been preserved according to law, the affirmative defense of statute of limitations applies to all collection efforts instituted after January 27, 2002." In Paragraph 3 of said Order, the Family Court found: "That the plaintiff took no action to toll the statue of limitations, and unless the judgment was otherwise refreshed by a new filing in the Office of the Clerk of the County Commission of Mingo County, West Virginia, the enforcability (sic) of said judgment was extinguished on January 27, 2002." Furthermore, in Paragraph 4 of said Order, the Family Court held: "That efforts to collect this decretal judgment are now subject to bar by the affirmative defense of statute of limitations."

INTRODUCTION

In the case at bar, the Family Court erred in finding that during the ten year period from January 27, 1992 through January 27, 2002, no actions other than administrative actions were taken by the Plaintiff to preserve the decretal judgment. The Family Court also erred in ordering that the affirmative defense of statute of limitations applies to all collection efforts instituted after January 27, 2002. Additionally, the Family Court erred in ordering that the enforceability of said judgment was extinguished on January 27, 2002. Furthermore, the Family Court erred in ordering that the efforts to collect this decretal judgment are now subject to bar by the affirmative defense of statute of limitations.

The Family Court's ruling ignores the fact that decretal judgments were granted in both the January 28, 1992 Order and the March 23, 1992 Order, and that Angela L. Varney could choose to enforce the judgment granted in either order. The Order entered on March 23, 1992, was not entered Nunc Pro Tunc to January 28, 1992, and the judgment granted therein is a valid and enforceable judgment in its own right.

In addition, when Cecil C. Varney filed for protection under Chapter 7 of the Bankruptcy Code, the automatic stay against enforcement actions against him went into effect. This tolled the statute of limitations from the time the bankruptcy was filed on January 29, 1992, until the Discharge Order was entered on May 15, 1992, which was a period of approximately three and one-half months. Therefore, the filing of the Chapter 7 Bankruptcy extended the ten year period for execution on the first judgment until May 15, 2002.

Furthermore, under West Virginia law the issuance of a Writ of Execution within ten years of the date of judgment operates to extend the judgment and keep the lien alive. Under

Shaffer v. Stanley, the issuance of a writ is not an administrative action. In the case at bar, numerous writs, executions, and suggestions have been issued on this judgment, beginning in 1996 and the ending in 2002. All of these have operated to extend the life of the 1992 judgment.

Finally, West Virginia law also provides that court action to collect on a judgment tolls the statute of limitations. In the case at bar, Angela L. Varney and the BCSE filed contempt actions in 1991 or 1992 and also 1997, and a Motion for Determination of Judgment in 2003. All of these actions tolled the statute of limitations while they were pending.

Therefore, the Family Court erred in finding that during the ten year period from January 27, 1992 through January 27, 2002, no actions other than administrative actions were taken by the Plaintiff to preserve the decretal judgment. The Family Court also erred in ordering that the affirmative defense of statute of limitations applies to all collection efforts instituted after January 27, 2002. Furthermore, the Family Court erred in ordering that the enforceability of said judgment was extinguished on January 27, 2002, and that efforts to collect this decretal judgment are now subject to bar by the affirmative defense of statute of limitations. The judgment granted Angela L. Varney in 1992 for $16,200.00, plus the interest that has accrued since then, is still valid and enforceable.

DISCUSSION OF LAW

West Virginia Code Section 38-3-18 provides as follows: "On a judgment, execution may be issued within ten years after the date thereof." In the case at bar, Angela L. Varney was granted judgment against Cecil C. Varney in the January 28, 1992 Order for "all arrearages of support and Five Thousand Two Hundred Dollars ($5,200.00) for payment made by the Plaintiff

on the debts." She was also granted judgment against him in the March 23, 1992 Order for "all arrearages of alimony totalling Eleven Thousand Dollars ($11,000.00), plus interest calculated at ten percent (10%) from the month of October, 1991, per annum, and Five Thousand Two Hundred Dollars ($5,200.00) for payments made by Plaintiff on the debts, plus interest, from the month of October, 1991, at rate of 10%, per annum."

Both the January 28, 1992 Order and the March 23, 1992 Order granted Angela L. Varney valid and enforceable judgments against Cecil C. Varney. The March 23, 1992 Order was not entered Nunc Pro Tunc to January 28, 1992, and this Court already has recognized that the March 23, 1992 Order clearly granted Angela L. Varney valid judgment in the amounts of $11,000 and $5,200.00 against Cecil C. Varney. [*See* Transcript of August 19, 2002 hearing, Pages 11 and 13.] Therefore Angela L. Varney could choose to enforce the judgment granted in the March 23, 1992 Order.

11 U.S.C. Section 362 provides that the filing of a petition for protection under the Bankruptcy Code operates as an automatic stay of any enforcement actions against the property of the debtor. In Chapter 7 filings, this stay is in effect until "the time a discharge is granted or denied." 11 U.S.C. Section 362(c)(2)(C). West Virginia law recognizes that the statute of limitations is tolled by the provisions of the automatic stay. [*See* West Virginia Code Section 55-2-22.]

In the instant case, Cecil C. Varney filed for protection under Chapter 7 of the Bankruptcy Code on January 29, 1992. Oddly enough, he filed his bankruptcy petition one day after the January 28, 1992 Order was entered granting judgment against him for past due support. And coincidentally, Cecil C. Varney's bankruptcy filing occurred only two days after the contempt

hearing in which the second judgment was granted against him, although the second judgment Order was not actually entered until March 23, 1992. Nevertheless, by filing for Chapter 7 protection he invoked the automatic stay and thus automatically tolled the statute of limitations from January 29, 1992 to May 15, 1992, when his Discharge Order was entered by the Bankruptcy Court. Therefore, even if no other factors existed to extend the statute of limitations, Angela L. Varney had until May 15, 2002 to execute on the judgments in order to preserve them.

The issuance of an execution operates to preserve a judgment. Collins v. Collins, 209 W. Va. 115, 543 S.E.2d 672 (2000). By definition, execution on a judgment is a judicial and not an administrative remedy. Indeed, in Shaffer v. Stanley, 2003 W. Va. Lexis 160 (November 26, 2003), the West Virginia Supreme Court of Appeals made the following statement: "We conclude, therefore, that an execution necessarily involves a court process wherein a judicial writ is issued."

In the case at bar, the records of the Circuit Clerk of Mingo County show that over the years numerous executions have issued pursuant to West Virginia Code Section 38-3-18 which satisfy the requirements of Shaffer v. Stanley, thus saving this judgment. On September 5, 1996, a Writ of Execution, Suggestion, and Abstract of Judgment were issued by said Circuit Clerk's Office. Another Writ and Suggestion were filed April 16, 1997. On March 20, 2002, a Writ of Execution, Abstract of Execution, an amended Abstract of Judgment, a Suggestee Execution, and numerous Suggestions of Personal Property were filed in the aforesaid Clerk's Office by Angela L. Varney in order to extend the life of the March 23, 1992 judgment. [*See* computerized Action Log of the Circuit Clerk of Mingo County, West Virginia, a copy of which is attached hereto.]

Additionally, on February 17, 2004 the Clerk of the United States District Court for the

Southern District of West Virginia issued a Writ of Execution on the Judgment Order granted Angela L. Varney by the Bankruptcy Court on February 17, 1994. Said Writ of Execution was recorded on February 23, 2004 in the Office of the Clerk of the County Commission of Mingo County, West Virginia in Execution Book 2 at Page 157. The Family Court was clearly wrong, then, when it found that Angela L. Varney had taken no actions other than administrative ones over the past ten years in order to preserve her judgment.

According to West Virginia Code Section 55-2-21, the filing of a civil action tolls the applicable statute of limitations. Additionally, in Robinson v. McKinney, 189 W. Va. 459, 432 S.E.2d 543 (1993), the Court found the appellant was not barred by the statute of limitations from collecting child support when she began the collection process by a notice to employer/source of income and by a **motion to establish arrearages**.(emphasis added)

In addition to the judicial executions Angela L. Varney used to preserve her judgment, she also filed various court actions which also had the effect of tolling or extending the statute of limitations herein. One contempt action was heard in 1992, and another one was filed on September 22, 1997. The contempt filed in 1997 was not concluded until an Order entered on August 26, 2002 dissolved the Rule to show cause. Therefore, the pendency of this contempt action tolled the statute of limitations for nearly five years. Finally, a Motion to Determine Judgment was filed in this case on or about May 19, 2003. Said Motion was pending before the Court until the entry of the December 21, 2004 Order which is the subject of this appeal. The pendency of the Motion to Determine Judgment thus tolled the statute of limitations for approximately eighteen months.

CONCLUSION

The Family Court , therefore, erred in finding that during the ten year period from January 27, 1992 through January 27, 2002, no actions other than administrative actions were taken by the Plaintiff to preserve the decretal judgment. Numerous writs, executions, and suggestions have been issued in the instant case from 1996 through 2004. In addition, a contempt action was filed in 1997 which tolled the statute of limitations until 2002, and a Motion to Determine Judgment was filed in May, 2003 which excluded the period through December 21, 2004 from being computed in the limitations period.

The Family Court also erred in ordering that the affirmative defense of statute of limitations applies to all collection efforts instituted after January 27, 2002. Both the judgment granted in the January 28, 1992 Order and the judgment granted in the March 23, 1992 Order are valid and enforceable judgments. The March 23, 1992 Order was not entered Nunc Pro Tunc to January 28, 1992. Therefore, Angela L. Varney could choose to enforce the judgment contained in the March 23, 1992 Order.

Additionally, the Family Court erred in ordering that the enforceability of said judgment was extinguished on January 27, 2002. Not only did the filing of the various executions and court actions toll the statute of limitations in this case, but Cecil C. Varney's filing of a Chapter 7 bankruptcy petition on January 29, 1992 stayed any enforcement actions for three and one-half months until his Discharge Order was entered on May 15, 1992. Thus, based solely on the automatic tolling of the statute of limitations by the bankruptcy's automatic stay, Angela L. Varney had until May 15, 2002 to renew her judgment. For all the reasons stated above, therefore, the Family Court erred in ordering that the efforts to collect this decretal judgment are

now subject to bar by the affirmative defense of statute of limitations.

The purpose of the statute of limitations is to bar stale claims that have long been idle. But in the case at bar, litigation surrounding the judgments has been pending in state or federal court for approximately nine out of the relevant ten years. This case is neither within the letter nor the spirit of the bar of the statute of limitations.

The decision below rests upon two erroneous conclusions. Overruling the Family Court on either ground requires reversal of the judgment. First, the Family Court determined that the March 23, 1992 Order was not a judgment that could be executed upon, from which it followed that the writ of execution March 20, 2002 could not be used to extend the obligation. As noted above, this Court had previously referenced this Order as an order for judgment. So the Family Court's ruling is contrary to the language of the Order and the prior ruling of this Court. The second conclusion is an error of both fact and law. The Family Court found that no actions had been taken which tolled the statute of limitations upon the January 2002 Order. However, as detailed in this brief, numerous actions have been taken which either temporarily halt the statute of limitations from running (motions, bankruptcy, etc.) or completely re-start the running of the statute of limitations (writs of executions).

In its June 23, 1993 Order Denying Defendant's Motion for Stay Pending Appeal, the Bankruptcy Court stated as follows:

> The Defendant has neglected to pay this debt, which arose in 1991, in spite of several orders from the state court commanding the Defendant to make these payments. The Plaintiff has had to endure this adversary proceeding in bankruptcy in order to have her support payments declared nondischargeable. Now the Defendant asks for a stay pending appeal of this Court's default judgment. Not only does this Court believe that such relief would only act to delay the inevitable, **such a delay would work an injustice to the Plaintiff who for two years has**

> **had to fight tooth and nail for support payments that should have been paid at the end of each month that they became due.** Accordingly, the Defendant' motion for stay pending appeal is DENIED. (emphasis added)

Fifteen years later, I am still in the same predicament. Despite years of intense litigation in both State and Federal Courts, I am no closer to receiving satisfaction of the judgment granted by the Courts than I was over a decade ago. I feel that I deserve justice, and am before this Court seeking the same.

Furthermore, the Final Order of the Court dated September 8, 2005, was not entered in a timely manner according to West Virginia Code, which states that the circuit court must enter an order ruling on a petition for appeal within sixty days from the last day a reply to the petition for appeal could have been filed. Judge Thornsbury blamed the delay on the fact that much of the record in this case was misfiled in the Circuit Clerk's office. Also, at the hearing on August 19, 2002, in front of Judge Thornsbury, Cecil Varney stated that a transcript, which Judge Thornsbury had requested was not available, and that was the reason why the case was delayed for so many years. Mr. Varney even stated that the Supreme Court said the transcript could not be found. However, the transcript was found filed in the Mingo County Clerk's Office, and it had been entered on record since April 1, 1999. It almost appears as it there might be some fraud or tampering with evidence. Mr. Varney is an attorney and may have access to records that seem to be gone and then reappearing in the court file. Mr. Varney did remove an exhibit (copy of tax return) from the court reporter's desk at a hearing in this case before Honorable David W. Knight.

Mr. Varney removed the exhibit when his attorney, along with Angela Varney's attorney and the court report were called to the Judge's bench. After much delay, Mr. Varney returned a copy of a tax return to the court with the front page missing, a copy of which is in the court file.

Also, the Final Order states that Mr. Varney's bankruptcy was not raised in the proceedings, when in fact it had been raised before both the Family Court and the Circuit Court – with copies of Orders being handed to them by Angela L. Varney. Refer to copy of a transcript of the hearing held before the Mingo County Circuit Judge on August 19, 2002, wherein Angela Varney made the court well aware of the bankruptcy proceedings and other ways that Cecil Varney had tried to get out of paying the judgment. At that hearing, Judge Thornsbury even told Angela Varney that she had a valid judgment and could take action to collect it. At the first hearing before the Family Law Judge, July 1, 2003, on a Motion for Determination of Judgment, Angela Varney handed a binder with copies of various orders including Cecil Varney's bankruptcy to the Honorable Robert Calfee, who asked Mr. Varney if he would like a copy of it and he stated that he already had one. At the November 12, 2003 hearing before the Family Law Judge, Angela Varney stated to Judge Calfee that she had a Judgment Order filed in the US District Court as a result of Mr. Varney's bankruptcy. The Judgment Order was renewed on February 17, 2004, and a copy of the order and a letter was forwarded to Judge Calfee. See copy of letter and Order in addenda.

The March date (and not the January date) had been established as the date for proceedings held in this case for attempts to collect on the Judgment against Cecil C. Varney. See copy of order signed by Honorable Elliott E. Maynard and also initial Abstract of Judgment in addenda.

Also, included herewith is a copy of a Memo dated July 14, 1993, regarding Mr. Varney's notice to the Dept. of Health and Human Resources Resources that he had filed for bankruptcy and that enforcement efforts violated the stay. This kind of stay would toll the Statute of Limitations.

Wherefore, I respectfully request the Court to reverse the Final Order of the Mingo County Court Judge entered on September 8, 2005; to order that the judgment totaling $16,200.00 granted Angela L. Varney against Cecil C. Varney in the March 23, 1992 Order is a valid and enforceable judgment; to order that efforts to collect on this decretal judgment are not barred by the affirmative defense of the statute of limitations; to order Cecil C. Varney to satisfy said judgment; and for such other and further relief as to this honorable Court seems just.

Respectfully submitted,

Angela L. Varney

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CERTIFICATE OF SERVICE

I do hereby certify that service of this Brief has been made on Cecil C. Varney by United States Mail, postage prepaid at the address listed below, on this 8th day of June, 2007.

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